Article

A Reassessment and Redefinition of Rape Shield Laws

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I. INTRODUCTION

There seems little dispute that historically, investigation and prosecution of sexual assault have left a great deal to be desired. Police have been notoriously nonresponsive to reports of sexual assault, if not outright hostile.[1] Prosecutors have been reluctant to prosecute all but the most blatant and violent of sexual assaults[2] and judges have instructed juries in a manner further burdening those cases which have hurdled the investigative/prosecutive barrier.[3] When prosecution has been brought, cross-examination of the complaining witness traditionally has permitted inquiry into past consensual sexual activities, resulting in publication of the most private aspect of a person's life under the guise of "relevance to consent."[4] But perhaps the most serious problem of all is one antecedent to all of these: the reluctance of victims of

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1. S. BROWNMILLER, AGAINST OUR WILL 309–12 (1975); S. ESTRICH, REAL RAPE 15–18 (1987).

2. Convictions are most likely to occur in cases that fit society's stereotype of rape—an act committed by an armed stranger—and are less likely in cases in which the woman and her assailant knew each other [which account for 70–80% of all sexual assaults], especially if they were dating or had any prior sexual contact. Due to that bias, police and prosecutors are often reluctant to charge perpetrators in acquaintance-rape crimes, just as juries are often unwilling to convict. This bias is so strong on all levels of the legal system that some rape crisis counselors now advise victims of acquaintance rape not to become involved in criminal proceedings at all.

R. WARSHAW, I NEVER CALLED IT RAPE 12, 127 (1988).

3. *E.g.*, former CALIFORNIA JURY INSTRUCTION—CRIMINAL INSTRUCTION No. 10.06 (3d rev. ed. 1970), prohibited in 1974 by Act of Sept. 23, 1974, ch. 1093, 1974 Cal. Stat. 2320 (codified as amended at CAL. PENAL CODE § 1127d(a) (West 1985)):

> Evidence was received for the purpose of showing that the female person named in the information was a woman of unchaste character.
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> A woman of unchaste character can be the victim of a forcible rape but it may be inferred that a woman who has previously consented to sexual intercourse would be more likely to consent again.
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> Such evidence may be considered by you only for such bearing as it may have on the question of whether or not she gave her consent to the alleged sexual act and in judging her credibility.

See also M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 606 (1847) (rape is a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent.")

4. The traditional justification for inquiry into a complaining witness' past sexual conduct was twofold: First, "unchaste" women were thought of as more likely to consent to sexual relations People v. Hastings, 72 Ill. App. 3d 316, 390 N.E.2d 1273 (1979), and second, "unchastity" was viewed as importing dishonesty. *See* Virgin Islands v. John, 447 F.2d 69 (3d Cir. 1971); S. BROWNMILLER, *supra* note 1, at 370–71.

sexual assault to complain,[5] so that the criminal justice system, with all its imperfections, is not even triggered into action.

There seems equally little dispute that some progress has been made in the past several years. Whether it is because of the increasing number of women recruited for police work or the development of sensitive crimes units,[6] or both, or because of a cause antecedent to both, the investigative component of law enforcement has become more responsive to victims of sexual assault.[7] The creation of private victim support organizations certainly has facilitated such increased responsiveness.[8] Cases have been prosecuted which undoubtedly would not have reached the courtroom in former days,[9] and some of the more outrageous judicial comments that graced earlier decisions seem to have significantly diminished in number.[10]

The problem of unlimited cross-examination of a complaining witness's sexual past has been dealt with by the federal government[11] and all states but Arizona and Utah[12] through the passage of rape shield laws. These laws are designed, through a variety of means, to restrict the historically unlimited inquiry into a woman's sexual past in order to negate the claim of nonconsensual sex. By curtailing such inquiry, it is hoped that not only will a particular case be resolved on more rational grounds, but

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5. Out of a sample of 3187 undergraduate women on 32 college campuses, 15.3% reported having been raped. Out of those 494 women, 42% told no one, 5% reported the attack to police and 5 reported to rape crisis centers. R. WARSHAW, *supra* note 2, at 48–50.

6. For example, the Madison, Wisconsin, police force as of March 1989 had 56 female police officers as opposed to 24 in 1979. Telephone conversation with police expediter Maryann Thurber, March 22, 1989. District Attorney's offices in King County in Seattle, Washington; Milwaukee County, Wisconsin; New York County, New York; Dade County in Miami, Florida; and Cook County in Chicago, Illinois, have sensitive crimes units that specialize in the prosecution of sexual assault and child abuse cases.

7. *See, e.g.*, R. WARSHAW, *supra* note 2, at 1: "Although official response [to the crime and the victims of rape] was still slow in coming, police and prosecutorial procedures in many states changed to offer more support for victims . . . and some states developed more effective ways to investigate and prosecute rape complaints."

8. There are over 274 rape crisis centers in the United States; there is at least one in every state. NATIONAL COALITION AGAINST SEXUAL ASSAULT JANUARY 1988 DIRECTORY OF ORGANIZATIONAL MEMBERS (published by Lois Loontjens, King County Rape Relief).

9. *See* State v. Gulrud, 140 Wis. 2d 721, 412 N.W.2d 139 (Ct. App. 1987). The defendant was convicted of three counts of second degree sexual assault. The victim was his former girlfriend, who drove him home after the rape occurred, returned to her apartment, and reported the sexual assault to the rape crisis center later that day. The victim had had consensual sexual intercourse with defendant on prior occasions.

10. There are, from time to time, judicial statements reflecting outmoded concepts. In Wisconsin three such recent instances are a matter of public record. *See, e.g.*, Capitol Times, Madison, Wisconsin, May 27, 1977, at 1 (Judge Archie Simonson, at a sentencing hearing for a teenage rapist, stated he felt rape was a normal reaction to a sexually permissive society. The judge was removed from office in a recall election.); Capitol Times, Madison, Jan. 13, 1987 (Judge William Reinecke, at a sentencing hearing for the rapist of a 5-year-old girl stated, "I am satisfied we have an unusually sexually promiscuous young lady and that this man just did not know enough to knock off her advances."); *In re* Judicial Disciplinary Proceedings Against the Honorable Ralph G. Gorenstein, 147 Wis. 2d 861, 870, 434 N.W.2d 603, 607 (1989) (Judge Ralph Gorenstein, during cross-examination of the victim at a trial for second degree sexual assault, ordered the victim to stop crying, stating "I think the female response to [sic] crying to any tough situation is inappropriate in a courtroom," and comparing her to a victim who testified the previous week stated, "she sat there and answered the questions in a businesslike, straightforward answer-like way, and I think you can do the same thing." Judge Gorenstein was suspended from sitting as a Reserve Judge for two years.) There is no reason to assume the Wisconsin experience is atypical. *See, e.g.*, Olden v. Kentucky, 86 CR-006, (Ky. Ct. App. May 11, 1988) (dissent); *Ms.-Trial!*, Ms. MAGAZINE, September 1988, at 64, describing the refusal of a federal district court judge to refer to a female attorney as "Ms." He asked her if he could call her "sweetie."

11. FED. R. EVID. 412.

12. C. MCCORMICK, MCCORMICK ON EVIDENCE § 193, at 573 (3d ed. 1984).

that a victim's reluctance to complain, grounded on fear of a "second rape"[13] at trial, will be eliminated as a factor in decisionmaking.[14]

The purpose of this Article is to examine the different types of rape shield laws which have been passed, to note their differences, to explore the kinds of problems which have arisen under them, and to propose a solution by which some of those problems can be avoided in the future. As will be seen, rape shield laws vary in approach and in scope. In the decade or two since their passage, cases which have arisen under them have demonstrated that the legislative effort at balancing a complaining victim's right to privacy and a defendant's right to present legitimate defense evidence has not been as finely tuned as either interest requires. The end result has been reversals of judgments of conviction which serve only to lengthen the prosecutive process by requiring retrials several years after the underlying event. Aside from the inevitable weakening of the prosecution's case incident to a belated retrial,[15] the psychological burden for the complaining witness is also prolonged, a consequence directly at odds with one of the major purposes of a rape shield law in the first place.

II. Rape Shield Statutes[16]

A. *Different Types of Statutes*

Professor Harriet Galvin, in an exhaustive and illuminating study of the nation's rape shield laws,[17] has divided such laws into four categories: the Michigan, Arkansas,[18] California, and federal approaches. In examining these categories, the parameters affecting the passage of such legislation should always be considered. On

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13. The fact that the woman is "on trial" as much as the defendant becomes apparent when one looks at the issues which most frequently come up during the hearings: . . . did the woman consent; did the woman struggle; the woman's sexual reputation, habits and behavior; the woman's general character . . . . The court process recapitulates, in a psychological manner, the original rape situation. . . . The focus of the woman's concerns . . . soon shifts from the defendant to the defense lawyer. He becomes the assailant in this new arena . . . . Again and again they [the victims] described the [defense] lawyer's actions as making them a nervous wreck, being offensive, twisting their words, degrading them, making them cry, and embarrassing them. These statements are similar to the ones the women made about the rapists immediately following the rape.

Burgess & Holmstrom, *Rape: The Victim and the Criminal Justice System*, in 3 Victimology: A New Focus 21, 28–29 (I. Drapkin & E. Viano eds. 1975).

14. "[T]he exclusion [of prior sexual conduct evidence] promotes effective law enforcement because victims can report crimes of rape and deviate sexual assault without fear of having the intimate details of their past sexual activity brought before the public." People v. Ellison, 123 Ill. App. 3d 615, 626, 463 N.E.2d 175, 183–84 (1984).

15. The acquittal rate on retrial after reversal has been reported at 50%. Roper & Melone, *Does Procedural Due Process Make a Difference?*, 65 Judicatus 136, 139 (1981) (a rate significantly higher than for first trials).

16. The term "rape shield law" has been universally applied to laws restricting the examination of a complaining witness about her sexual past. As such they create a "privacy shield" for such witnesses. They certainly do not provide a protection from rape and therefore seem to have been misnamed. Similar laws have been described more precisely. For example, laws creating a journalist's privilege have been called "Journalist Shield Laws," G. Lilly, An Introduction to the Law of Evidence, 448–49 (2d ed. 1987), a more precise description. The term "rape shield," however, has been so universally used to connote the concept of privacy protection for victims of sexual crimes that no effort to change such usage, however inaptly coined, will be undertaken here.

17. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763 (1985–86).

18. Galvin's article refers to the Texas-type statute, rather than the Arkansas-type statute. Since her article, however, the Texas statute has been changed but Arkansas, which had a Texas-type statute at the time of Galvin's article, has retained its law.

the one hand, there is the desire to provide a certain rationality to the decisionmaking process by eliminating evidence having no bearing on consent and likely to confuse the jury, evidence which also serves the highly undesirable purposes of invading a witness's privacy and discouraging victims from bringing their complaints to the criminal justice system.[19] On the other hand, there is the defendant's right to a fair trial which includes the right to present evidence bearing directly either on the defendant's guilt or innocence, or on the credibility of a major prosecution witness. The Supreme Court cases of *Chambers v. Mississippi*[20] and *Davis v. Alaska*[21] are the judicial expression of that other hand—grounded, of course, in the Constitution's guarantee of a fair trial and due process of law.

Almost half the states have modeled their rape shield laws on the Michigan prototype.[22] These statutes create a general prohibition of any evidence of prior sexual conduct by the complaining witness subject to designated exceptions which usually number at least two. Prior sexual relations with the defendant are usually excepted,[23] as are sexual relations with third parties to explain physical evidence of sexual activity such as pregnancy, semen, or venereal disease.[24] When the defendant proposes to elicit evidence under one of the exceptions, there are usually procedural requirements compelling advance notice of such intent and *in camera* hearings to resolve questions raised under these procedures.[25]

It is very clear that in states following the Michigan prototype, the legislatures have left courts with little room to maneuver. The balance between interests limiting inquiry into a victim's sexual past[26] and the defendant's interest in presenting evidence helpful to the defense is struck legislatively and definitively. The opposite approach is taken by Arkansas and nine other states which follow it.[27] In these

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19. *See supra* note 14.

20. 410 U.S. 284 (1973).

21. 415 U.S. 308 (1974).

22. Galvin, *supra* note 17, at 908–11.

23. With the accused, only on consent: ME. R. EVID. 412; MINN. R. EVID. 404(c); MO. ANN. STAT. § 491.015 (Vernon Supp. 1986); VA. CODE ANN. § 18.2–67.7 (1988).

24. Physical consequences evidence: N.C. R. EVID. 412 (all physical consequences); VT. STAT. ANN. tit. 13 § 3255 (Supp. 1989) (semen, disease, pregnancy); FLA. STAT. ANN. § 794.022(2)–(3) (West Supp. 1989) (semen, pregnancy, disease, injury). Tennessee and Wisconsin include prior false allegations of sexual assault as exceptions to their rape shield laws. TENN. CODE ANN. § 40-17-119 (1982); WIS. STAT. ANN. §§ 972.11(2), 971.31(11) (West 1985).

25. Under Illinois' rape shield law the defendant must make an offer of proof at an *in camera* hearing to determine whether evidence of his prior relationship with the victim will be admitted. The offer of proof must be specific as to the date, time and place the prior sexual conduct is alleged to have occurred. These procedures are necessary only if the victim denies the prior sexual conduct with the accused. ILL. ANN. STAT. ch. 38 § 115-7(b) (Smith-Hurd Supp. 1989). Under the Michigan rape shield statute the defendant must file a written motion and offer of proof with the court within 10 days of the arraignment. The court then has discretion to order an *in camera* hearing. MICH. COMP. LAWS ANN. § 750.520j(2) (West Supp. 1989). The Alabama rape shield law provides that the court shall conduct an *in camera* hearing to determine the admissibility of prior sexual conduct evidence, the proceedings shall be included in the trial transcript, and the court shall state by order what evidence, if any, may be introduced at trial and in what manner. ALA. CODE § 12-21-203(d) (1986).

26. The word "victim" is used interchangeably with the term "complaining witness" throughout this article. From a precise criminal justice point of view, the latter is the preferred manner in which to describe the woman claiming sexual assault since the term complaining witness does not imply a conclusion about the incident underlying the trial. The term "victim" assumes that no consent was given since only then are there both a crime and a victim.

27. Galvin, *supra* note 17, at 907. At the time of Galvin's article, Texas was within this category of jurisdictions. It has since changed its rape shield law. TEX. R. CRIM. EVID. 412.

jurisdictions, the law creates no substantive evidentiary exclusions[28] but rather insures an *in camera* determination of the question in a setting where the court is specifically instructed to consider whether the probative value of evidence outweighs its prejudicial effects.[29] While it may appear initially that such a purely procedural approach would not make a significant change in trials, Professor Galvin's study of appeals from trial court decisions restricting defendants' ability to explore the sexual past of the victim suggests that courts, which prior to the enactment of the statutes had been articulating the very reverse proposition, now generally exclude such evidence on the ground that it is not relevant to the credibility of the victim.

It could be argued that a review of appeals from convictions is an inadequate basis for any conclusions about the effectiveness of the Arkansas-type statutes because of the one-sided nature of the appellate process. The government cannot appeal from an acquittal, and when the trial court's discretion was exercised in favor of admissibility and when the defendant was acquitted, there will be no appellate decision to review. Even when the defendant is convicted, if the evidentiary ruling on prior sexual conduct by the victim was in favor of admissibility, the issue cannot be raised on appeal and the lower court's decision will not be discernible from the appellate decision unless that ruling is collaterally germane to the issues raised.

Whatever the merit to these observations, it is unlikely that the same judges who rule in favor of exclusion in the cases when appeals are taken would rule dramatically otherwise in different cases, especially since the rulings are made before the verdict is known. Further, Galvin's review of cases under the Arkansas statute, where both the prosecution and the defendant may take an interlocutory appeal from a pretrial ruling under the rape shield law, suggests no such pattern by Arkansas trial judges. In ten of eleven such interlocutory appeals, it was the defense who raised the issue, suggesting that at least as far as Arkansas prosecutors were concerned, trial courts were ruling correctly.

The federal rape shield law—Rule 412 of the Federal Rules of Evidence—partly combines the Michigan- and Arkansas-type statutes. Under Rule 412, followed in six states,[30] there is a general rule excluding a victim's past sexual conduct subject to a number of exceptions which vary with each jurisdiction.[31] Generally, prior sexual relations with the defendant are admitted on the defense of consent and sexual relations with others are admitted to prove that physical evidence of sexual assault is not attributable to the defendant. The Rule then provides for a constitutional catchall

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28. The Alaska and New Jersey rape shield statutes require courts to consider the privacy interest of the victim as an explicit counterweight to relevance of prior sexual conduct evidence. In addition, both statutes presume that evidence of prior sexual conduct occurring more than a year before the date of the charged offense is inadmissible. *See* Galvin, *supra* note 17, at 878–79.

29. ARK. STAT. ANN. § 411810.2(b) (1977).

30. CONN. GEN. STAT. ANN. § 54-86F (West 1985); HAW. R. EVID. 412; IOWA R. EVID. 412; N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981); OR. REV. STAT. ANN. § 40.210 (1988). Texas' recently enacted rape shield law brings it within this category as well. TEX. R. CRIM. EVID. 412.

31. For example, Oregon specifically allows prior sexual conduct evidence to show motive to fabricate or bias and to rebut medical evidence introduced by the state, and Connecticut, among other purposes, specifically allows evidence of prior sexual conduct between the complainant and the accused, and evidence of physical consequences. OR. REV. STAT. ANN. § 40.210 (1988); CONN. GEN. STAT. ANN. § 54-86F (West 1985).

clause: essentially, when the court determines that the evidence in question must be admitted to insure the defendant's right to a fair trial, then the evidence is admitted. As is the case with most rape shield legislation, there are procedures requiring a motion under the catchall clause to be made in advance of trial for an *in camera* determination of the issue.

The California approach divides evidence of the complaining witness's conduct into two categories: evidence relating to consent which is inadmissible, and evidence relating to credibility which is admissible.[32] While the recognition that evidence of past sexual conduct may be admissible for one purpose but not another is helpful,[33] it invites the danger of resurrecting the concept that "promiscuity imports dishonesty," a concept rejected by California courts prior to the enactment of its rape shield law.[34] In fact, the inclusion of past sexual conduct for purposes of credibility was spawned by the Supreme Court's decision in *Davis v. Alaska*.[35] The language of the statute itself therefore is needlessly broad. Further, there is the danger that in cases where the issues of consent and credibility merge, the statute may result in the admission of the kind of evidence rape shield laws are designed to avoid—prior sexual acts offered to prove consent in the instant case.[36] Ironically, the Washington and Nevada rape shield statutes, based on California's law, accept the consent/credibility dichotomy but admit the past sexual conduct evidence for purposes of proving consent but not lack of credibility.[37]

B. *Rape Shield Laws: Rules of Relevance or Privilege?*

Despite the prevalence of rape shield laws there is surprisingly little discussion of whether these laws are rules that define what is relevant, rules which acknowledge that certain types of evidence are relevant but exclude such relevant evidence because the probative value is outweighed by counterweights, or rules which acknowledge that relevant evidence should be excluded because of the privacy interests of the victim in particular, and the need to encourage victims to report crimes and participate in the administration of justice process in general.

Indeed, the general justification for rape shield laws at various times includes all four. Some courts have found the justification to be (1) the harassment and humiliation of the victim,[38] (2) the exclusion of irrelevant evidence,[39] (3) the need to keep the jury focused on relevant issues,[40] and (4) the furtherance of effective law enforcement by insuring that victims are not discouraged from cooperating with the

32. CAL. EVID. CODE. §§ 782, 1103 (West Supp. 1989).
33. Galvin, *supra* note 17, at 794.
34. *See* People v. Johnson, 106 Cal. 289, 294, 39 P. 622–23 (1895).
35. 415 U.S. 308 (1974); *see* Comment, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS L.J. 1551, 1562–63 (1975).
36. People v. Varona, 143 Cal. App. 3d 566, 192 Cal. Rptr. 44 (1983).
37. WASH. REV. CODE ANN. § 9A.44.020 (1988); NEV. REV. STAT. §§ 48.069, 50.090 (1986).
38. People v. Cornes, 80 Ill. App. 3d 166, 175, 399 N.E.2d 1346, 1353 (1980).
39. People v. Ellison, 123 Ill. App. 3d 615, 626, 463 N.E.2d 175, 183–84 (1984).
40. State v. Morley, 46 Wash. App. 156, 730 P.2d 687 (1986).

police for fear of the trial.[41] Some courts rely on all four.[42] As will be seen, this hodgepodge of justifications combines three different evidentiary concepts.

1. *Relevance*

When proof of prior sexual conduct is excluded because it has no bearing on consent, the rape shield statute is clearly a statute of relevance. Irrelevant evidence, however, is already excluded under Rule 402 of the Federal Rules of Evidence and the inevitable counterpart to that provision either in the common law or in the evidence code of all the states.[43] What we have then is a special kind of relevance determination, legislatively made, that certain evidence is not relevant to a particular case. This is both unusual and impossible.

The only other effort in the Rules of Evidence to legislatively define what is relevant is found in Rule 404(b), which provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith on a particular occasion. Indeed, at first blush, Rule 404(b) bears a striking similarity to a rape shield law, only as its reverse. If the prosecution attempts to prove that a particular person is the rapist alleged, it is not permitted, under Rule 404(b), to use prior sexual assaults solely for the purpose of proving the one in issue. From this perspective, a rape shield law precluding proof of prior sexual conduct by the victim to prove consent seems the perfect mirror to such a provision. There are, however, some major differences, one of which is that Rule 404(b) provides that the evidence excluded by the general sweep of the rule may be admissible for other purposes. Rape shield laws following the Michigan prototype have but a small number of narrowly defined exceptions and no leeway for anything else.

As will be seen in Part III, the failure of the Michigan-type shield law to contain such leeway has resulted in repeated findings of unconstitutionality, or where the courts are reluctant to find a statute unconstitutional, to findings that the law is inapplicable or does not mean what it says. These conclusions follow inevitably from the effort of trying to legislate relevance without allowing for the infinite variety of circumstances that can coalesce to form the facts of a particular case. The federal statute provides a case in point.

Rule 412 sets forth the general exclusionary rule with respect to the complaining witness's past sexual conduct, establishes procedural requirements if the general rule is not to be followed, and then excepts from the general rule, if admitted in accordance with the procedural requirements, "past sexual behavior with the accused . . . offered by the accused upon the issue of whether the alleged victim consented to the

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41. State v. Gardner, 59 Ohio St. 2d 14, 391 N.E.2d 337, 340 (1979).

42. State v. Herndon, 145 Wis. 2d 91, 108, 426 N.W.2d 347, 363 (Ct. App. 1988); *Ellison*, 123 Ill. App. 3d at 626, 463 N.E.2d at 183–84 (1984).

43. *See, e.g.*, TEXAS R. CRIM. EVID. 402: "All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is inadmissible."

sexual behavior with respect to which rape or assault is alleged."[44] On its face this seems like a rational and precise statement of when prior sexual contact with the accused is relevant and one would be hard pressed to find fault with it. That inability, however, is solely a function of the limits of one's imagination. *United States v. Willis*,[45] fortuitously one of the few federal rape prosecutions, illustrates such limits.

Willis was a black employee of the *S.S. United States*, and on one of its transoceanic voyages—hence federal jurisdiction—was alleged to have raped a white passenger from Italy. Willis's defense was that prior to the alleged rape he had had consensual sexual relations with the woman but because she feared she would have a mulatto child, she accused him of raping her on a day, as it turned out, when, according to him, they had no sexual contact at all. Thus, Willis's defense was not consent; Willis claimed nothing happened. In order to present his defense, however, he had to put into evidence his prior sexual contact with the complaining witness. That part of Rule 412 which provides that past sexual behavior with the accused is admissible upon the issue of consent with respect to the alleged rape would have been of no avail to Willis. There can, however, be no doubt that Willis was entitled to prove his past sexual relationship with the complaining witness. The constitutional catchall provision of Rule 412 would permit such proof; without such a provision, the statute as applied would be unconstitutional,[46] a result directly attributable to the difficulty of an all-inclusive relevancy determination by the legislature or drafters of the rule.

2. *Relevance versus Counterweights*

As we have seen, one justification for rape shield laws is that whatever relevance the prior sexual conduct of the complaining witness has, it is outweighed by the damage to her privacy interests and, as well, the confusion such evidence of prior conduct brings to the jury's deliberations. By definition, when evidence of such conduct is introduced into the trial, it deals with other events and other participants which usually are more remote than the subject of the litigation. There is, therefore, as a general rule, the possibility that the probative value of the evidence, concededly meeting minimal relevance requirements, will be outweighed by the counterweights of confusion of the issues and waste of time. Some rape shield laws are grounded on the legislative balancing of these different interests.

Because the test for relevance is so minimal[47]—is the proponent's case stronger or the opponent's case weaker than would be so without the evidence?—there is already in pre-existing law a mechanism designed to exclude relevant evidence whose probative value is small. Rule 403 provides that a court may exclude relevant evi-

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44. FED. R. EVID. 412.

45. 33 F.R.D. 510 (S.D.N.Y. 1963).

46. This would be the case, for example, under the Pennsylvania law. 18 PA. CONS. STAT. ANN. § 3104 (Purdon 1983).

47. FED. R. EVID. 401.

dence if its probative value is substantially outweighed by the risk of unfair prejudice, confusion, waste of time, or misleading the jury.[48]

There is, of course, one major difference between Rule 403 and a rape shield law which balances the different interests. Rape shield law balancing is done legislatively; that is, for all cases. Rule 403 creates the mechanism of balance but leaves it to the trial judge to decide, in each individual case, how the scales tip when probative value is put on one side and the counterweights of prejudice, confusion, and waste of time are put on the other. A relatively common problem in sexual assault cases demonstrates the difficulty of legislative balancing.

When a young girl testifies about sexual contact with an adult, the very use of sexual terms and familiarity with sexual concepts creates a corroborative element with respect to her direct examination. In such a case, the prosecution has not "opened the door" to proof of other sexual activity by the complaining witness other than by presenting the bare minimum of its case. The defendant in these cases often wishes to avoid the corroborative component of such evidence by showing that the victim had prior sexual experiences, and that those experiences account for her familiarity with terms and concepts one ordinarily would not expect from a person her age.[49]

If the complaining witness is eleven years old, then the corroborative force (probative force) of her knowledge, *i.e.*, "expertise," will obviously be stronger than if she is fifteen. Correspondingly, the probative force of proof of prior sexual conduct will be greater if she is eleven rather than fifteen. It is therefore immediately apparent that the age of the complaining witness is a variable of the admissibility issue on an almost theoretically infinite scale of variability. Other considerations affecting the balance exist on a scale of comparable variation. What was the prior sexual conduct? Was its scope of the magnitude that would explain all, some, or just a small amount of the "expertise" which triggers its possible admission? How recent was it? How difficult is it to prove such conduct? How long will it take? Is it in dispute, or conceded, or partly conceded?

It should be plainly apparent from this brief dissection of but one of the many problems occurring with respect to prior sexual conduct that any effort to legislatively balance probative value and counterweights is doomed. The settings in which these problems arise simply cannot be pigeonholed with enough precision to permit the undertaking. Not surprisingly, such an effort at conclusive legislative balancing is unprecedented. The closest the rules of evidence come to such an effort is once again Rule 404 and even there, the balance is not frozen. Examination of a Rule 404 situation demonstrates the difference.

It could be argued that proof of prior crimes is relevant, under the minimal definition of relevance, to a charge of subsequent and similar criminality. To use the sexual assault analogy, when a man convicted of six prior sexual assaults is on trial for a seventh and claims that the sexual relations were consensual, it would seem

48. FED. R. EVID. 403.

49. *See* State v. LeClair, 121 N.H. 743, 433 A.2d 1326 (1981).

relevant, within the Rule 402 definition of the term, that on six past occasions the defendant had forcibly overcome resistance against sexual contact. Presumably, if it happened six times in the prior year in settings similar to the one in issue, it would be "very" relevant,[50] or to use the Rule 403 terminology, highly probative. Nevertheless, under Rule 404, if the prosecution offered such evidence to prove forcible sexual conduct in the case in issue, it would not be permitted to do so.

If one accepts the relevance of such evidence, as I believe one must, then the question becomes, why is it excluded? There appears to be a balancing in Rule 404 which, essentially, gives the litigant against whom the similar acts are offered the benefit of a clean slate. The rule therefore represents a legislative judgment that whatever the probative value of the evidence, it is more important that the person against whom it would otherwise be admitted have the benefit of starting from scratch.[51] Since codified in the rule, this is a legislative policy judgment no different in form than a rape shield law striking a balance in favor of exclusion. The difference, however, between a rape shield law and Rule 404 is that Rule 404 contains the "if offered for other purposes" provision so that the legislative requirement of exclusion is tempered by an awareness that evidence may be admissible for purposes other than a prohibited one. A majority of rape shield laws permits no such tolerance.

3. *Rape Shield Laws as Laws of Privilege*

Rape shield laws are the product of two common law homilies fundamentally antagonistic to modern concepts of sexuality. The first is the notion that prior consensual sexual conduct itself makes more likely consent on a given, later occasion. This idea has been both prosaically articulated as "the underlying thought here is that it is more probable that an unchaste woman would assent . . . than a virtuous one"[52] and more colorfully in *People v. Abbot*,[53] where the New York courts, 150 years ago, distinguished between a woman "who has already submitted herself to the lewd embraces of another, and the coy and modest female severely chaste and instinctively shuddering at the thought of impurity. . . . And will you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia?"[54] The second kernel of wisdom, one which had fallen into considerable disfavor in recent years because of its one-sided thrust, was that promiscuity imports dishonesty,[55] a concept, incredibly, which courts refused to apply to men: That which

50. Evidence is either relevant or not. There is a certain conceptual impurity in referring to "highly" relevant evidence or "minimally" relevant evidence. The term "probative" is a more appropriate quantifier.

51. Sometimes the justification advanced for excluding evidence of similar conduct is that there is a serious risk that a jury would be prejudiced by such evidence and basically find against the actor on the gut theory that if he did it six times he did it seven. C. MCCORMICK, *supra* note 12 §§ 185, 190, at 545. This cannot, however, be the basis for the rule since the rule applies both to jury and nonjury trials, and in nonjury trials, the court is deemed incapable of prejudice. Gulf States Utils. Co. v. Ecodyne Corp., 635 F.2d 517, 519 (5th Cir. 1981). The only justification for the rule is the clean slate concept.

52. Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 15 (1977).

53. 19 Wend. 192 (N.Y. 1838).

54. *Id.* at 195–96.

55. Brown v. State, 50 Ala. App. 471, 474, 280 So.2d 177, 179, *cert. denied*, 291 Ala. 774, 280 So.2d 182 (1973).

"destroys the standing" for truth of females "in all walks of life has no effect whatsoever on the standing for truth" of males.[56]

It is understandable why the common law notions that prior consensual sexual conduct make consent more likely and detract from a complaining witness's credibility are anathema to today's world and why a legislative body attempting, by statute, to permanently rid the courtroom of such arguments would frame its words in terms of relevance. Certainly the plain fact of prior consent does not make consent in a given case more likely and certainly it has no bearing on credibility. Therefore, if rape shield laws simply provided that "when evidence of prior sexual conduct is offered for purposes of showing consent in a particular case or to impeach the credibility of the complaining witness through a general attack on the character of the witness, it is not admissible" there would not be a problem.[57] As has been seen, however, rape shield laws go beyond such limited objectives and attempt to exclude prior sexual conduct altogether, unless offered for one of the specified purposes. By their own terms, they appear to articulate more than simple relevancy concepts.

Despite the greater breadth to such laws, they are still generally regarded as rules of relevance. For example, Federal Evidence Rule 412 is found in Article IV of the Rules, that part dealing with "Relevancy and its Limits." Professor Galvin, in her thoughtful study of over a decade of cases under rape shield laws, concludes that the principal goal of a rape shield law should be the exclusion of irrelevant evidence, and since a defendant has no constitutional right under either *Davis v. Alaska* or *Chambers v. Mississippi* to the admission of irrelevant evidence, there is no fundamental conflict between the protection of a victim's privacy interests and the defendant's right to a fair trial.

Some courts, however, view the rules of evidence under rape shield laws as rules of privilege.[58] There are both procedural and substantive consequences to such a view. First, if rape shield statutes create a privilege rather than simply articulate a legislative reminder to courts as to what is relevant and what is not, then the woman whose privacy right underlies the privilege is far more likely to have standing in pretrial disputes dealing with the meaning and scope of a rape shield law. Such standing is far more difficult to come by if a ruling admitting prior sexual conduct is simply viewed as a ruling on relevance. Indeed, it would seem difficult to justify those cases which give the victim standing to participate in the trial court's decision

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56. State v. Sibley, 131 Mo. 519, 532, 33 S.W. 167, 171 (1895); Galvin, *supra* note 17, at 787; Berger, *supra* note 52, at 16.

57. Since irrelevant evidence is already excluded under the rules of evidence in every jurisdiction, the need for such a statute is itself an interesting commentary on problems in sexual assault trials. Prior to the enactment of a rape shield law, when a court admitted such evidence, the issue could obviously not be raised on appeal since the evidentiary ruling was in favor of the one party who could appeal a judgment of conviction. When the evidence was excluded, however, the defendant could raise the issue on appeal. It is clear that enough appellate courts were overturning convictions because such evidence had been excluded to require legislative action. *See, e.g.*, United States v. Kasto, 584 F.2d 268, 272 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) (overruling) Packineau v. United States, 202 F.2d 681 (8th Cir. 1953)); People v. Fryman, 4 Ill. 2d 224, 122 N.E.2d 573 (1954); Commonwealth v. Manning, 367 Mass. 605, 328 N.E.2d 496 (1975); People v. Ruiz, 71 A.D.2d 569, 418 N.Y.S.2d 402 (1979).

58. *See, e.g.*, State v. Walsh, 126 N.H. 610, 495 A.2d 1256 (1985); State v. Gonyaw, 146 Vt. 559, 507 A.2d 944 (1985).

on admissibility[59] or to appeal an adverse ruling[60] if anything less than a privilege were involved. In upholding the woman's right to appeal a pretrial decision permitting the introduction of evidence under the federal rape shield statute, the Fourth Circuit noted that there was no other way her privacy interests could be protected since "no other party in the evidentiary proceeding shares these interests. . . ."[61]

Second, there is the question of waiver. In *State v. Gavigan*,[62] the defendant was charged with sexual assault committed in the victim's apartment after she had invited him in to her apartment from a public hallway where he was waiting for someone else to return. The prosecution contended that the ensuing sexual encounter was forcible, while the defendant contended it was consensual. To assist in proving its case, the prosecution tendered evidence that the victim, who was then twenty-eight years old, was a virgin prior to the encounter with the defendant. The obvious thrust of this proof was the reverse of the prohibited common law inference: if she had not consented to sexual relations by the age of twenty-eight, she was not likely to do so with a stranger.[63] The trial court admitted the evidence and the conviction was affirmed.[64]

If the rule excluding the victim's prior sexual conduct (or lack thereof) is seen as a rule of relevance, then obviously the victim cannot waive an impediment to admissibility since questions of relevance are for the court to decide. If, however, the rule is seen as one of privilege, then obviously the beneficiary of the privilege is free to waive it, and if the evidence satisfies other admissibility requirements, including relevance, there will be no reason to exclude it. When seen from this perspective, a privilege to exclude evidence of prior sexual conduct embraces both otherwise admissible and inadmissible evidence, something usually the case with any privilege.[65] If the holder of the privilege waives it, something the holder of any evidentiary privilege can do,[66] and if the evidence meets the remaining obstacles to admissibility, it should be admitted.

Any other result is both patronizing and needlessly categorical. It may well be that a majority, indeed an overwhelming majority, of sexual assault victims treasure

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59. *See Walsh*, 126 N.H. 610, 495 A.2d 1256.

60. Doe v. United States, 666 F.2d 43 (4th Cir. 1981).

61. *Id.* at 46.

62. 111 Wis. 2d 150, 330 N.W.2d 571 (1983).

63. The sole evidentiary issue was whether the prosecution could permissibly argue that the complainant's virginity made consent less probable, not that virginity established the fact of such lessened probability.

64. For subsequent history to the *Gavigan* case, see *infra* notes 77–80 and accompanying text. In State v. Williams, 16 Ohio App. 3d 484, 477 N.E.2d 221 (1984), *aff'd*, 21 Ohio St. 3d 33, 487 N.E.2d 560 (1986), the Ohio courts found that the victim waived the protection of Ohio's rape shield law when she denied having consensual sexual relations with the defendant by testifying she was a lesbian. Despite the restrictive provisions of Ohio's rape shield law, evidence of past heterosexual conduct on her part was admitted to rebut the claim of lesbianism. The court found that by introducing evidence of lesbianism, the complainant waived the protection of the rape shield law.

65. For example, an attorney may be aware of information learned from a client which contains assertions by the client based on other than first hand knowledge. If the attorney-client privilege were waived, that would not insure the admissibility of such evidence at the trial of someone else, even though other portions of what the client told the attorney might be.

66. A person can consent to the warrantless search of his house, waiving fourth amendment protections, testify in a grand jury after having been advised of the right not to have to do so, waiving fifth amendment protections, or proceed to trial without counsel, waiving sixth amendment protections.

and find essential the right to their privacy afforded by a rape shield statute. It defies common sense, however, to conclude that all such victims always will insist on that right with respect to all prior sexual conduct which, in certain cases, may be minimal, already public knowledge, or something whose publication simply does not particularly offend them. In any event, such judgments should be left to the person whose rights are protected by the rape shield laws, as is the case with every other privilege created by law. To single out this particular group of persons—complaining witnesses in sexual assault cases—and state conclusively that they cannot waive a right to privacy a statute gives them is to treat them in a manner consistent with the common law found so abhorrent, and understandably so, by proponents of rape shield legislation.

There are, however, consequences to a "privilege" approach to rape shield statutes beyond such procedural ones. Privileges, as a general rule, state that the interests of arriving at the truth will be subordinated to some other societal interest.[67] Some of these other interests, such as the avoidance of compelled self-incrimination, the sanctity of one's home, or the confidentiality of one's conversations with an attorney, are constitutional in origin. Others, such as the confidentiality of interspousal communications or the sources for a journalist's writings are subconstitutional in origin. Some are absolute, such as communications to attorneys. Others are qualified: only unreasonable searches and seizures are prohibited;[68] the journalist's privilege may have to give way if compelling circumstances exist.[69] Regardless of origin or scope, however, the fundamental antagonism between the interests protected by privilege and the search for truth is recognized and the world, somehow, does not come to an end. The difficulty, however, is that there is a factual distinction between a privilege protecting confidential communications and one protecting past acts. Where a privilege covers communications intended to be confidential, the outside world is ordinarily unaware of the evidence. This may not at all be the case with respect to prior sexual conduct. That is precisely why there has been, as will be seen, such a plethora of constitutional litigation under Michigan-type statutes.

When a third party admits to his attorney that he committed a crime which a defendant is charged with and provides sufficient itemization in the admission so that there is corroborative detail in it,[70] a defendant charged with that crime will not be able to place such facts into evidence because he will be unaware of them. Despite the sweep of *Davis v. Alaska* and *Chambers v. Mississippi*, where, through no fault of the state's, or even of defense counsel, the defendant is unaware of critical evidence of innocence, he is without both right and remedy. Such is the effect of privilege. The dilemma posed by the juxtaposition of societal interests creating a privilege and a defendant's constitutional right to introduce exculpatory evidence is obviated by the inherently confidential nature of the privileged evidence.

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67. *See* C. MCCORMICK, *supra* note 12 § 72, at 170–72.

68. The fourth amendment is itself qualified, prohibiting only *unreasonable* searches and seizures.

69. State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971). For an example of a statutory journalist's shield law see N.J. STAT. ANN. §§ 2A, 84A-21 (West Supp. 1988).

70. Declarations against penal interest are admissible on behalf of an accused if there is corroborative evidence for such declarations. FED. R. EVID. 804(b)(3). It does not take much imagination to lace a confession to an attorney with sufficient detail about a crime to provide for self-corroboration.

When evidence is covered by a rape shield statute, it is by definition not confidential communication which is the subject of an exclusionary rule, but rather conduct which may be a matter of public record such as prostitution arrests[71] or some other conduct the defendant is aware of either through his knowledge of the complainant or through the knowledge of others he knows. In these settings, ignorance of exculpatory evidence does not keep us from having to decide which way to strike the balance between the societal interest in exclusion and the defendant's interest in admission. If we mean what we say, however, in creating a privilege for prior sexual conduct, then accessibility to proof of that conduct will not be an automatic ground for its receipt into evidence.

III. Problems Under Existing Rape Shield Laws

A. *Introduction*

The Arkansas-type rape shield laws simply create procedural mechanisms to insure that questions relating to the prior sexual conduct of the complaining witness are resolved before trial and in secret. No substantive provisions are contained in such laws. As has been seen, what little data there is on the application of such statutes has not been discouraging. It is difficult, however, to conclude that the ultimate objective of a rape shield statute—avoiding needless harassment and invasions of privacy of complaining witnesses—is accomplished with such scant data.

The California-type statute involves considerable difficulty because it creates a distinction between the evidence offered to prove consent and evidence offered to impeach the credibility of the witness who denies consent. Often, this distinction is more fanciful than real.[72] Furthermore, such statutes are in effect in only a few states and the case law under them does not suggest great success.[73]

The federal statute, in effect in all federal courts and now in six states, appears to have worked fairly well because of the presence of the catchall clause for evidence constitutionally required to be admitted. While one might wonder whether the uncertainty of admissibility introduced by the existence of an open-ended catchall clause inhibits complaints by victims of sexual assault, this does not appear to be the case.[74]

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71. State v. Herndon, 145 Wis. 2d 91, 246 N.W.2d 347 (1988).

72. *See* Galvin, *supra* note 17, at 894–902.

73. *Id.* at 902.

74. Rape victim advocates in the states that have the catchall provision (Oregon, New York, Connecticut, Hawaii, and Iowa) say that it has little or no impact on a victim's decision whether to report the assault to the police. Terry Lum of the Sex Abuse Treatment Center in Honolulu stated that generally victims ask how much they will be "on trial," whether or not they are familiar with the law. She stated that since the introduction of this evidence is not automatic, victims do not tend to regard it as determinative. Telephone interview with Terry Lum, Jan. 24, 1989. Similarly, advocates in Connecticut, New York, and Iowa say that the catchall provision is not a factor in the decision to report rather fear of retaliation and the expectation of insensitive treatment by law enforcement personnel discourage the victim. Telephone interviews with Marion Taylor, Women's Center of Southeastern Connecticut, New London, Jan. 25, 1989; Sally Angell, Rape Crisis Center of Greater Danbury, Jan. 26, 1989; Ilene Redden, Hartford Region Sexual Assault Crisis Service, Jan. 27, 1989; Ann Sparks, St. Vincent's Hospital Rape Crisis Program, New York, N.Y., Jan. 24, 1989; Julie Gumbiner, Iowa City Rape Victim Advocacy Program, Jan. 24, 1989; Linda McGuire, First Assistant Prosecutor, Johnson County, Iowa, Jan. 24, 1989; Carol Meade, Iowa Coalition Against Sexual Assault, Des Moines, Feb. 2, 1989. Two advocates report that although the law has a minimal effect on victims overall, they have seen a few victims pull out

As has been noted, the definition of those instances when prior sexual contact between the defendant and the complaining witness may be admitted appears to have been too narrowly drawn but the existence of the constitutional catchall provision saves the rule. Nevertheless, the failure to make clear the waivability of the rule and the lack of clarity regarding the standing of the complaining witness has served, in my opinion at least, to constitute a weakness in the rule.

Examination of the Michigan-type statutes, in effect in one-half of the states, however, reveals major problems in approach and effect.

B. *The Impossible Goal of Michigan-Type Statutes*

As has been seen, Michigan-type statutes define with precision those instances in which the prior sexual conduct of the victim may be inquired into at trial.[75] The obvious objective of such legislative draftsmanship is to prevent courts from admitting anything other than what is explicitly authorized. The difficulty with this approach is that courts are under the constraints of *Davis v. Alaska* and *Chambers v. Mississippi* and the effort of predicting all the possible instances when the constitutional principles underlying those cases compel the admission of prior sexual conduct must fail.

The dialogue between the Wisconsin legislature and its courts is illustrative of this failure. Initially, Wisconsin's rape shield law excluded any evidence of prior sexual conduct unless it was offered to show consensual relations between the complaining witness and the defendant; to prove the source of semen, pregnancy or disease, or to show prior false allegations of sexual assault.[76] In *State v. Gavigan*,[77] the prosecution elicited the complaining witness's lack of prior sexual conduct to show the unlikelihood of consent. The prosecution's theory was that because the victim was a virgin she would be less likely to consent to having her first sexual experience with a total stranger. The Wisconsin Supreme Court, in upholding the conviction despite the failure of the rape shield law to permit evidence for such purpose, held that the statute had to be so construed because "[t]o exclude such testimony would be to deny the jury access to critical facts surrounding the event."[78] In his dissent, Chief Justice Heffernan argued that the virginity evidence allowed the jury to draw exactly the type of inference the rape shield law was meant to forbid: that prior sexual conduct of the victim is relevant to the issue of consent.[79]

The Wisconsin legislature thereafter amended its rape shield law to provide that

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of prosecutions when they learned about the catchall and the possibility that evidence of their prior sexual conduct might be admitted at trial. Telephone interviews with Marilyn Gunsul, Rape Victim's Advocate, Portland, Oregon, Jan. 24, 1989; Kate Davis, Rape Crisis Network, Eugene, Oregon, Jan. 27, 1989. Interestingly, one advocate reported that the catchall was not an issue for rape victims because the police and prosecutors decline prosecution in those cases where they think prior sexual conduct evidence would be constitutionally required to be admitted. Telephone interview with Marti Anderson, Rape Crisis Center, Des Moines, Feb. 2, 1989.

75. Galvin, *supra* note 17, at 908–11.

76. WIS. STAT. § 972.11(2)(b)(3) (1982).

77. 111 Wis. 2d 150, 330 N.W.2d 571 (1983).

78. *Id.* at 161, 330 N.W.2d at 577.

79. *Id.* at 172, 330 N.W.2d at 583.

the exclusionary thrust of the law applied "regardless of the purpose of the admission or reference unless the admission is expressly permitted under [the statute]."[80] *State v. Herndon*[81] and *State v. Pulizzano*[82] demonstrate the constitutional difficulties such a restriction creates.

In *Herndon*, the victim claimed that she had been sexually assaulted by the defendant after the defendant forced her into his automobile. Prior to trial, Herndon offered to prove that the victim had twice been arrested for prostitution in the same neighborhood and around the same time as his encounter with her. He also offered to prove that the victim's mother disapproved of her daughter's activities and made clear they were not to recur. The defendant wanted to show that the victim's motive to fabricate the sexual assault was to explain her disheveled appearance to her mother upon returning home without revealing that she was continuing in her activities as a prostitute. The trial court, constrained by the narrowness of the rape shield statute, sustained an objection to the proffer, noting that "if the defendant is convicted, the appellate court will have to take another look at the literal application of the law."[83] Herndon was convicted.

On appeal, the court reviewed a variety of cases under the Michigan-type statute and found that the possible impact of the excluded proof on the motive of the complaining witness to falsify was too strong to warrant exclusion and that the principles of *Davis v. Alaska* and *Chambers v. Mississippi* compelled the admission of the evidence. Accordingly, it held the rape shield statute, as applied to the facts in the case, unconstitutional.[84]

In *Pulizzano*, the defendant was accused of sexually assaulting two of her children and two nephews. One of the nephews testified about such an assault on him and two other boys using terminology not ordinarily associated with a child of his age. In an attempt to prove that he acquired a familiarity with such terms elsewhere, Pulizzano inquired on cross-examination about a prior sexual assault and the trial court, applying the rape shield law, precluded such inquiry. Pulizzano was convicted.

On appeal, the court of appeals found that the sexual assault was within the wording of the rape shield law but that the application of the rape shield law to the facts was unconstitutional under *Davis v. Alaska*. It noted that Pulizzano's effort to rebut the inference that the child's sexual knowledge was gained as a result of her assault on him was constitutionally sanctioned, and following a similar case in Nevada,[85] reversed the judgment of conviction. *Pulizzano* is pending review in the Wisconsin Supreme Court.[86]

Herndon and *Pulizzano* are typical of many of the cases decided under the Michigan-type statutes. In some cases the courts rewrite the rape shield law to

80. WIS. STAT. § 972.11(2)(c) (1985).

81. 145 Wis. 2d 91, 426 N.W.2d 347 (Ct. App. 1988).

82. 148 Wis.2d 190, 434 N.W.2d 807 (Ct. App. 1988).

83. *Herndon*, 145 Wis. 2d at 100 n.1, 426 N.W.2d at 350 n.1.

84. In finding the statute unconstitutional, the court directed the legislature's attention to the federal-type statute with the constitutional catchall provision. *Id.* at 130, 426 N.W.2d at 363.

85. Summitt v. State, 101 Nev. 159, 697 P.2d 1374 (1985).

86. *Pulizzano*, 148 Wis. 2d at 190, 434 N.W.2d at 807.

accommodate evidence whose admission is felt to be constitutionally mandated; in others the courts find the law unconstitutional as applied to the facts.

1. *Rewriting the Statute*

Shockley v. State[87] is one of several cases where prior sexual conduct, excluded by a rape shield law, was tendered to explain physical evidence. In *Shockley*, the defendant was not permitted to explain the victim's pregnancy by offering evidence of other sexual conduct on her part. Tennessee's statute, like the federal statute and that of several other states,[88] did not permit proof of other sexual conduct to prove pregnancy. The judgment of conviction was reversed, the court concluding that the legislative intent was to remove common law smearing of the victim and the evidence excluded was tendered for a different purpose.

In *Commonwealth v. Lyons*,[89] the defendant was not permitted to explain the presence of blood in the victim's panties by offering evidence of other sexual conduct on her part which he said had occurred the same day as the alleged rape. Pennsylvania's statute[90] did not permit proof of other sexual conduct to prove physical consequences of intercourse. Nor did the statute allow the defendant to introduce other sexual conduct to rebut the state's introduction of physical consequences evidence. The appellate court reversed the conviction. The court, relying on *Commonwealth v. Marjorana*,[91] concluded that the rape shield law did not apply when the defendant was seeking to explain the objective signs of intercourse, rather than attempting to smear the credibility of the victim by offering other sexual conduct to prove consent.[92]

Similarly, in *State v. LeClair*,[93] the defendant wanted to show other sexual conduct on the victim's part to explain the presence of semen. New Hampshire's statute did not permit such proof. The New Hampshire Supreme Court reversed the judgment of conviction, noting that the trial court had misinterpreted the statute and that if it was to pass constitutional muster, it had to be interpreted more broadly to permit the use of such evidence of other sexual conduct.[94]

State v. Howard[95] is like *Pulizzano*. The defendant offered evidence of a twelve-year-old's prior sexual conduct to show that her "expertise" was not derived from his rape of her. The New Hampshire Supreme Court held that to avoid serious constitutional issues, New Hampshire's rape shield law had to be interpreted to permit the introduction of such evidence even though its literal wording excluded it. The judgment of conviction was reversed.

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87. 585 S.W.2d 645 (Tenn. Crim. App. 1978).

88. FED. R. EVID. 412; TENN. CODE ANN. § 40-17-119 (1982).

89. 364 Pa. Super. 620, 528 A.2d 975 (1987).

90. 18 PA. CONS. STAT. ANN. § 3104a (Purdon 1983); *see also* ALA. CODE § 12-21-203 (Supp. 1985).

91. 503 Pa. 602, 470 A.2d 80 (1983).

92. *Lyons*, 364 Pa. Super. at 624, 528 A.2d at 977.

93. 121 N.H. 743, 433 A.2d 1326 (1981).

94. *See also* People v. Mickula, 84 Mich. App. 108, 269 N.W.2d 195 (1978); Commonwealth v. Jorgenson, 512 Pa. 601, 517 A.2d 1287 (1986).

95. 121 N.H. 53, 426 A.2d 457 (1981).

In *Commonwealth v. Joyce*,[96] the defendant wanted to show that the victim had been charged with prostitution twice in the six months preceding the date of the alleged rape and that her motive to falsify the rape was her fear of a third prosecution. The Supreme Court of Massachusetts found that the trial court misapplied the rape shield statute to exclude evidence indicative of a possible bias on the part of the victim, concluding that the legislature did not intend to exclude such evidence in the rape shield statutes. The judgment of conviction was reversed. Other courts have dealt with motive evidence more directly, and like *Herndon*, have found rape shield laws unconstitutional.[97]

2. *Problems in Constitutionality*

a. *Motive Cases*

Rules of evidence relating to facts upon which a motive to falsify argument can be based reflect the importance such lines of attack have in the impeachment process. Unlike the rules of evidence relating to the proof of misconduct not amounting to conviction, when the court has the discretion to preclude such proof altogether, and if not precluded, the cross-examiner is bound by the witness's answer,[98] the cross-examiner is never bound by the denial of facts upon which a motive to falsify can be grounded.[99] One reason for this distinction is undoubtedly that the use of prior misconduct is a general attack on the character of the witness while an effort to show a motive to falsify is far more focused on the case in question and therefore far more central to effective cross-examination.

Whatever the reason for the distinction, the United States Supreme Court in *Davis v. Alaska*[100] raised to a constitutional level this particular method of impeachment. In *Davis*, the Alaska courts precluded the defendant from examining a prosecution witness about a juvenile conviction because of the state's confidentiality laws relating to such convictions. The Supreme Court reversed the conviction. It found

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96. 382 Mass. 222, 415 N.E.2d 181 (1981).

97. The one occasion the United States Supreme Court has had to review "motive evidence" came in Olden v. Kentucky, 109 S. Ct. 480 (1988) (per curiam), where the lower court found Kentucky's rape shield law inapplicable but nevertheless excluded evidence of other sexual conduct on grounds of prejudice. In *Olden*, the defendant, a black man, was accused of various sexual assaults on a white woman. At the trial, he was not permitted to cross-examine her boyfriend, who was also black, or to cross-examine her, about their existing extramarital relationship. The purpose behind such inquiry was to show that the existing relationship provided the victim with the motive to lie about the sexual contact with the defendant, who claimed such contact was consensual. The trial court excluded the evidence, not under Kentucky's rape shield law, but rather on grounds that it was prejudicial to the victim. In a per curiam decision, the Supreme Court reversed, finding that Olden's right to a fair trial compelled that he be able to impeach the motive of the complaining witness with the excluded testimony.

More recently, in Daniels v. State, 767 P.2d 1163 (Alaska Ct. App. 1989), the defendant was charged with sexually assaulting a foster child in his and his wife's care. He attempted to show that the child made the accusation of sexual assault after it was discovered that she had admitted to sexually assaulting a young boy and he and his wife told her she would have to leave because they had young boys in the house. The trial court excluded the evidence on the ground that its prejudicial effect outweighed its probative value. The Alaska appellate court reversed on the authority of Davis v. Alaska.

98. FED. R. EVID. 608(b).

99. G. LILLY, *supra* note 16, at 358–59.

100. 415 U.S. 308 (1974).

that such restraint was impermissible because the defendant was entitled to show that the witness, who was on probation from a juvenile offense, had a reason to lie because of his precarious status as a probationer. "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[101]

Nowhere is the failure of the Michigan-type statutes more evident than in cases where prior sexual conduct of the complainant is offered, not to show a pattern of consent, but rather as the basis for the argument that such prior conduct is the factual predicate for a motive to falsify. The *Herndon* case already discussed is but one of many such cases. The *Willis* case previously mentioned, which demonstrated the constitutional failure of an apparently innocuously worded consent exception to a general rule of exclusion, is also one of the many cases in this category.

In *State v. Jalo*,[102] the defendant claimed that the victim accused him of rape because he had discovered her having sexual relations with the defendant's son and that the accusation of rape was fabricated to retaliate and to avoid punishment for the conduct the defendant claimed he observed. The trial court, applying existing Oregon law, excluded the evidence; the Oregon Court of Appeals reversed,[103] principally on the authority of *Davis v. Alaska*. The Oregon statute was subsequently amended to permit the use of prior evidence of sexual conduct if offered to show a motive to lie or the bias of the complainant.[104]

In *Commonwealth v. Black*,[105] the defendant argued that his daughter's complaint against him was designed to remove him from the house so she could continue an ongoing sexual relationship with her brother. Applying existing Pennsylvania law, the trial court excluded the evidence since it did not fit any of the exceptions of the rape shield law. The Pennsylvania appeals court reversed on the authority of *Davis v. Alaska* and the constitutional imperative not to exclude proof relating to motive to lie.

These cases, as well as cases decided on nonconstitutional grounds, demonstrate that a rape shield law not allowing for proof of prior sexual conduct on the motivation of the complainant, where that motivation is an important issue in the case, is too narrow and will always fail when subjected to the constitutional requirements of *Davis v. Alaska*. The Michigan-type statutes are burdened with a major flaw.

b. *Pattern Cases*

One of the most difficult evidentiary issues arises when prior acts of misconduct are offered, not to show a proclivity towards the commission of such acts since that would be an improper purpose under Federal Evidence Rule 404, but rather to show

101. *Id.* at 316–17. *See also Olden*, 109 S. Ct. 480.

102. 27 Or. App. 845, 557 P.2d 1359 (1976) (en banc).

103. *Id.* at 851, 557 P.2d at 1362.

104. Act of July 27, 1977, ch. 822 § 1(5)(a), 1977 Or. Laws 863, 864 (codified at OR. REV. STAT. ANN. § 40.210(2)(b)(A) (1984)).

105. 337 Pa. Super. 548, 487 A.2d 396 (1985).

a pattern of behavior of which the behavior in issue is a part. In such a circumstance, the evidence of other crimes may be received under the "plan" exception of Rule 404(b). For example, in a murder prosecution the prosecution may place into evidence other murders committed as part of the spree which includes the homicide charged.[106] The justification for such admission is predicated on the similarity between the other acts and the act in issue as well as the proximity in time between them.[107]

It follows then that when the defendant is charged with sexual assault, the prosecution may place into evidence other sexual assaults by the defendant if they are close in time to the one on trial and if there is a large degree of similarity between the "other" acts and the one alleged.[108] This is permitted because of the exceptions to the general prohibition of such evidence found in Rule 404 relating to evidence showing a "plan." Is there a parallel result with respect to other acts by the complaining witness? Three of the states with Michigan-type statutes have such an exception;[109] for the balance the issue is whether such an exception is constitutionally required.

This difficult question is posed by a hypothetical created by Professor Berger. She posits a case where a woman over a brief period meets men in a singles bar, takes them home with her, and then has consensual sexual relations with them. After having done this twenty times, she meets the defendant at the same bar, takes him home with her, and then, according to her she is sexually assaulted; according to him, their sexual relations were consensual.[110] Should the defendant be permitted to prove the prior twenty consensual sexual acts between the complaining witness and other men to bolster his defense of consent?

While the majority of commentators on the question say the pattern evidence should be allowed,[111] a minority believes the evidence is inadmissible,[112] also the view of the few but fractious cases deciding the question.[113] The principal argument against such proof is that what distinguishes the cases is that in the case on trial, the

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106. Williams v. State, 251 Ga. 749, 783-85, 312 S.E.2d 40, 70–71 (1983); State v. Fernandez, 28 Wash. App. 944, 628 P.2d 818 (1980), *modified*, 640 P.2d 731 (Wash. App. 1981).

107. *See* United States v. Bailleaux, 685 F.2d 1105, 1109-1110 (9th Cir. 1982), *Williams*, 251 Ga. 749, 312 S.E.2d 40.

108. *See, e.g.*, State v. Taylor, 735 S.W.2d 412 (Mo. Ct. App. 1987) (evidence that defendant committed sexual assault on a 14-year-old babysitter was admissible under common scheme or plan exception to other crimes rule in his trial for sexual assault upon his 14-year-old stepdaughter); People v. Oliphant, 399 Mich. 472, 250 N.W.2d 443 (1976) (evidence that defendant sexually assaulted other women in his car after lulling them into it admissible to disprove his version of alleged sexual assault in car).

109. FLA. STAT. ANN. § 794.022(2) (West Supp. 1989); MINN. R. EVID. 404(c)(1)(A)(i); MINN. STAT. ANN. § 609.347(3)(a)(1) (West Supp. 1989); N.C. R. EVID. 412(b)(3).

110. Berger, *supra* note 52, at 59–60.

111. *See, e.g.*, Amsterdam & Babcock, *Proposed Position on Issues Raised by the Administration of Laws Against Rape: Memorandum for the ACLU of Northern California*, in B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 839, 841 (1975); Berger, *supra* note 52, at 65; Galvin, *supra* note 17, at 903–04; Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause?*, 9 IND. L. REV. 418, 430 (1976).

112. *See, e.g.*, S. BROWNMILLER, *supra* note 1, at 385–86; 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5387, at 583–88 (1980).

113. *See* State v. Cassidy, 3 Conn. App. 374, 489 A.2d 386, *cert. denied*, 196 Conn. 803, 492 A.2d 1239 (1985); State v. Vaughn, 448 So. 2d 1260 (La. 1984); State v. Patnaude, 140 Vt. 361, 438 A.2d 402 (1981); State v. Hudlow, 99 Wash. 2d 1, 659 P.2d 514 (1983) (en banc); State v. Morley, 46 Wash. App. 156, 730 P.2d 687 (1986).

complaining witness claims lack of consent while in any other "similar" case there is no such claim. Thus, such other evidence can be offered only for the impermissible purpose of arguing that because consent was given on other occasions, it must be inferred in the case on trial—exactly the type of argument rendered inadmissible by a rape shield law.

The argument in favor of admissibility is that when there is a close nexus between the "similar" acts and the one in issue, the inference that a plan to have consensual sexual relations under those circumstances is a plausible one. Because the inference relates to the plan rather than the general proclivity of the complaining witness, the impermissible inference is not the one relied upon. Therefore the defendant should be entitled to argue it.

There is no question that the similar acts evidence is offered as circumstantial evidence of consent because, according to its proponents, it establishes a pattern of conduct. The opponents see no circumstantial use other than the prohibited one. While relevance is, as has been noted, a question of law under Rule 402, that does not mean that the permissibility of an inference is a totally objective matter. Professor Wigmore has stated that in determining relevance "the logical powers employed must be those of everyday life, not those of the trained logician or scientist."[114] While in most cases, "everyday life" has a common meaning, it is certainly possible that in some instances subjective considerations rooted in race, economic class, or gender may influence a person's judgment grounded on "everyday life." Thus it may well be that whose "everyday life" is called upon to draw the inference will determine whether the evidence is admissible.[115]

It is unlikely that one more evidentiary analysis of this over-analyzed but difficult issue will make much difference. Nevertheless, it strikes me that when the other acts are similar and close to the degree that Professor Berger's hypothetical envisages, the evidence is relevant and admissible but its admission is not constitutionally required. Once the evidence of similar acts is admitted, the prosecution is free to argue to the jury that the absence of any complaint of assault in the other cases establishes the *bona fides* of the complaint in the case before the jury and the jury is certainly free to accept that argument. Admissibility, however, hinges not on what the jury does with the facts but with the permissibility of the inference urged by the proponent of the evidence. It is plausible for the defendant to argue that a woman who has engaged in consensual sexual relations in circumstances close in setting and time to those in issue has a plan to have consensual sexual relations under those circumstances. The plausibility of the argument establishes the relevance of the facts.

Simply because the evidence is admissible under a straight test of relevance, however, does not establish that it is constitutionally required to be admitted. Absent a rape shield law, the only traditional counterweight that would weigh against the

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114. 1 WIGMORE ON EVIDENCE § 27, at 407 (3d ed. 1940).

115. *See, e.g.*, S. BROWNMILLER, *supra* note 1, at 386; C. GILLIGAN, IN A DIFFERENT VOICE (1982); S. ESTRICH, *supra* note 1, at 57–66. Estrich observes that "force" means different things to men who, as boys, live with and accept a level of force well beyond what most girls find common. Therefore, if male judges instruct juries on what is or is not permissible force in a sexual assault case, a gender bias may easily be built into the law. Jurors may also reflect that bias.

relevance of the evidence is the risk of confusion to the jury—that it might not understand the distinction between evidence offered to show a plan, a legitimate purpose, and evidence offered to show a character trait towards certain conduct, an illegitimate purpose. Of course, when such evidence is offered against a defendant, the same risk of confusion and also prejudice exist but this does not ordinarily serve to exclude the evidence. In such cases, however, there is not the key distinction found here; namely, in the incident underlying the trial, as opposed to the others, the complaining witness denies consent.

It is this factual difference that urges against the constitutionality of the requirement that such evidence be admitted. The very fact that the prosecutor has a strong argument to rebut the evidence makes its legitimate use a far less exculpatory item of evidence than would be the case when the similarity between the crime charged and prior acts is total. For the purpose of admissibility, it does not matter that the opponent can muster an equal or even stronger circumstantial argument on the basis of the facts; the only issue is whether the proponent's argument is one which can rationally be made.[116] The constitutional test for admissibility must be far stricter, however. Certainly not all admissible evidence is constitutionally required to be admitted. When, the weight of the evidence is as diluted as is the case here, because of the signal distinction that in this case the complaining witness claims rape, the admission of the evidence can hardly be said to be constitutionally required.[117]

3. *Reputation Evidence*

Is evidence of the victim's reputation for promiscuity in general, or meaning "yes" when she says "no" in particular, admissible? The answer should initially be a function of the substantive law of sexual assault. If that substantive law makes the defendant's state of mind on the victim's consent an element of the crime, then the next issue becomes the defendant's awareness of such reputation. If there is awareness then the Rule 403 counterweights must be considered.

The case law and jury instructions show a surprising amount of disagreement among jurisdictions regarding the requisite mental state for a sexual assault conviction. Some jurisdictions require no culpable state of mind, only that the act of sexual contact or intercourse occurred without the victim's consent.[118] Others require that the defendant's belief in consent be reasonable,[119] and still others allow a defense of mistaken belief in consent without the requirement that the belief be reasonable.[120]

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116. *See* G. LILLY, *supra* note 16, at 30–33.

117. If the evidence is offered for purposes of showing a motive to falsify, then the result might well be different. For example, if the defendant claims that the allegation of sexual assault is caused by his failure to pay for an act of prostitution, then prior acts of prostitution under almost identical settings would be admissible to show the motive to falsify on the part of the complaining witness.

118. *See* State v. Cantrell, 434 Kan. 426, 673 P.2d 1147 (1983), *cert. denied*, 469 U.S. 817 (1984); State v. Reed, 479 A.2d 1291 (Me. 1984); People v. Hammack, 63 Mich. App. 87, 234 N.W.2d 415 (1975); Commonwealth v. Williams, 294 Pa. Super. 93, 439 A.2d 765 (1982); WISCONSIN JURY INSTRUCTION 1200.

119. CALIFORNIA JURY INSTRUCTIONS-CRIMINAL INSTRUCTION No. 10.65.

120. Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983). *See also* Director of Public Prosecutions v. Morgan, 2 W.L.R. 913 (1975). Professor Estrich takes the view that the law should impose a duty on men to respect the word

Several states follow the view that the defendant's thoughts on the victim's consent are not an element of the crime.[121] These states do not require the prosecution in a rape case to prove a specific intent on the part of the defendant. The issue is raised when the defendant asks and the trial court refuses to instruct the jury that "if the defendant reasonably believed that the prosecutrix had consented to his sexual advances that this would constitute a defense to the rape . . . ."[122] In these jurisdictions the appellate courts, in affirming the refusal to give such a charge, state that specific intent is not an element of rape, and therefore mistaken belief, even if it is reasonable, is not a defense.[123] In these jurisdictions, therefore, evidence concerning the victim's reputation for promiscuity or anything more specific would be irrelevant and properly excluded.

Several states follow the view that a reasonable belief by the defendant that the victim consented is a defense to the charge. In the related cases of *Commonwealth v. Sherry*[124] and *Commonwealth v. Lefkowitz*,[125] the Massachusetts supreme court and court of appeals affirmed judgments of conviction when the trial judge refused to give a mistaken belief instruction. The courts acknowledged that the legislature, by omitting a specific intent requirement from the sexual assault statute, could have sought to deter rapists by putting them at risk for any sexual conduct induced by force or threats despite a claim of consent.[126] However, in *Sherry*, the defendants, while raising the issue of mistaken belief, failed to raise the "reasonableness" of the belief. Thus the court left open the possibility that a reasonable belief in consent could be a defense to the charge of rape.[127]

California also adheres to the view that reasonable belief in consent is a defense to a sexual assault charge.[128] The California jury instruction for rape prosecutions states that rape is a general intent crime and that intent is negated if the defendant had a reasonable and good faith belief that the victim was consenting.[129] This instruction must be given when the evidence at trial justifies such a defense.[130]

Alaska gives the defense the greatest latitude by following the English rule that a good faith belief in consent, even if mistaken and unreasonable, is a defense.[131] However, while no specific mental state is mentioned in the Alaska rape law, the state must prove that the defendant acted recklessly regarding the victim's consent. In *Reynolds v. State*,[132] the court held that a defendant can argue mistake of fact and the state, to obtain a conviction, must prove that the defendant knowingly engaged in

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"no." Thus, in her view, a victim's reputation is irrelevant since mistaken belief in consent is not a defense. S. ESTRICH, *supra* note 1, at 98.

121. *See supra* note 118.

122. Commonwealth v. Williams, 294 Pa. Super. at 99–100, 439 A.2d at 769.

123. *See* cases cited *supra* note 118.

124. 386 Mass. 682, 437 N.E.2d 224 (1982).

125. 20 Mass. App. Ct. 513, 481 N.E.2d 227 (1985), *further relief denied*, 396 Mass. 1103 (1985).

126. *Id.*, at 519 n.15, 481 N.E.2d at 231 n.15.

127. *See Sherry*, 386 Mass. at 697, 437 N.E.2d at 233.

128. People v. Mayberry, 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975).

129. *See supra* note 119.

130. People v. Hampton, 118 Cal. App. 3d 324, 173 Cal. Rptr. 268 (1981).

131. Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

132. *Id.*

sexual intercourse and recklessly disregarded his victim's lack of consent.[133] Under Alaska law, a defendant does not have to prove reasonableness; if the jury finds that he was actually unaware of the risk that the victim was not consenting, he may be acquitted. The Alaska rule gives the defendant the ability to prevail even if he acted unreasonably.[134]

When the defendant's state of mind concerning the victim's consent is in issue, evidence of a victim's reputation for promiscuity or anything more concrete would be relevant if the defendant was aware of such reputation and its use was to support his defense of reasonable (or unreasonable), good faith belief in consent. Such use of reputation evidence would not appear to be within the scope of a victim's privileged prior sexual conduct since it does not matter what she did, only what she is reputed to have done.[135] In fact, since reputation evidence is offered solely because of its impact on the defendant's state of mind, it could be totally untrue and still be admissible.

Relevance alone, however, is not dispositive of admissibility. Even if relevant, the counterweights of Rule 403[136] and its state equivalents could prevent the defendant from introducing reputation evidence. It is certainly possible that the reputation evidence could be from so attentuated a source and so vague in its content that its probative value would be exceedingly low. Juxtaposed with such minimal probative value is the danger that the jury could use the reputation evidence improperly to infer consent from the reputation for promiscuity instead of using the evidence for the purpose for which it is offered, to prove the defendant's state of mind. Evidence risking irrational decisionmaking is prejudicial under Rule 403 and therefore potentially excludable under the rule.

A final mechanism to prevent reputation evidence from having an overreaching effect[137] lies in the ability of the court to keep an issue from going to the jury. Where the defense of mistaken belief in consent is judicially created, if the evidence does not support such a defense, a trial judge may refuse to give the mistaken belief jury instruction.[138] The same power would permit the court to exclude such evidence if an accompanying offer of proof does not portend sufficient credible evidence to take the issue to the jury.[139]

Rule 412 of the Federal Rules of Evidence specifically provides that "reputation or opinion evidence of the past sexual behavior of an alleged victim . . . is not admissible."[140] That provision, like all its other provisions, however, is subject to the

133. *Id.* at 625.

134. *Reynolds* at 625 (citing 2 Alaska Senate Journal 142 (1978)).

135. Conceivably it could be argued that if the purpose behind a rape shield law is to remove all impediments to a victim's cooperation with the criminal justice system, even pure reputation evidence should be shielded. After all, even the thought that a trial will lead to publication of a victim's reputation might discourage testifying. The remoteness of reputation evidence would suggest that minimal probative value together with the traditional counterweights are sufficient to exclude such evidence where admission is unwarranted.

136. FED. R. EVID. 403.

137. *See* S. BROWNMILLER, *supra* note 1, at 371.

138. People v. Hampton, 118 Cal. App. 3d 324, 173 Cal. Rptr. 268 (1981).

139. *Id.*

140. FED. R. EVID. 412.

constitutional catchall found in the Rule. *Doe v. United States*[141] explored the extent to which reputation evidence would have to be admitted under the catchall provision.

In *Doe*, the defendant was charged with sexually assaulting the complainant, apparently on an army base. He had testified that several men told him she was promiscuous and that he had read a love letter she had written to another man. In compliance with the procedural requirements of Rule 412, he moved to have seven items of evidence introduced under the catchall clause of Rule 412. The first five pertained to the general reputation of the complaining witness as sexually promiscuous, the sixth pertained to a telephone conversation he had had with her, and the last related to his "state of mind as a result of what he knew of her reputation . . . and what she said to him."[142] The trial court ruled that all seven items were admissible.

The complaining witness appealed. Initially, the Fourth Circuit dealt with the defendant's challenge to the complainant's standing to appeal. It found that affording her standing was implicit in a statutory scheme that was explicit in its desire to protect her privacy and that no other party in the case shared that interest. Accordingly, it reached the merits of the case.[143]

As to the first five items, the court found that even before the enactment of Rule 412, federal law provided that evidence of a complainant's unchastity, whether in the form of acts proving it or reputation evidence proving it, was ordinarily found insufficiently probative on either the issue of consent or credibility to outweigh its prejudicial effect. While the court expressed a reluctance to conclude that "extraordinary circumstances will never justify admission of such evidence to preserve a defendant's constitutional rights,"[144] it did not find any such circumstances in the record. As to the last two items, those not pertaining to the witness's general reputation but pertaining specifically to the defendant's knowledge, the court held that such evidence was admissible. The remaining five items ruled admissible by the trial court were found inadmissible.

The result in the *Doe* decision is correct and has been so viewed.[145] Aside from the fact that reputation evidence is not evidence of prior sexual conduct, as long as the substantive law of sexual assault makes a belief in consent a defense, the defendant ought to be allowed to show the basis for that belief. It would make no sense to permit belief in consent to be a defense and then preclude a defendant from adducing evidence the essence of which is to create such a belief. Of course the admission of the evidence does not automatically establish reasonable belief, it simply provides the basis for an argument to that effect to the jury which is free to find otherwise.[146]

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141. 666 F.2d 43 (4th Cir. 1981).

142. *Id.* at 47.

143. *See also* State v. Miskell, 122 N.H. 842, 451 A.2d 383 (1982) (where the victim had standing to appeal).

144. *Doe*, 666 F.2d at 48.

145. *See generally* Galvin, *supra* note 17, at 850–53.

146. It is tempting to draw an analogy to the law relating to assault where a reasonable belief in the victim's aggressiveness is a defense to reasonable self-defense measures. *See* Bennett v. Scroggy, 793 F.2d 772 (6th Cir. 1986). The analogy, however, breaks down quickly. Mistake, or incorrectly ignoring evidence of physical aggressiveness, risks physical injury to oneself. Mistake, or incorrectly ignoring evidence of sexual interest, does not entail risks of the same order or magnitude. Further, in the context of sexual relations, there is time to ask and the consequences of mistake, whether reasonable or unreasonable, can be devastating for the nonconsenting party.

4. *Rebuttal Proof*

We have already discussed cases where the inference of sexual knowledge on the part of the complaining witness itself points towards the defendant. In such a case, the defendant is permitted to introduce evidence of prior sexual conduct of the complainant to rebut that otherwise normal inference. Evidence of the complainant's virginity or homosexuality, if offered to show nonconsent (in the latter case to a claim of consent to heterosexual relations) can be rebutted by prior sexual conduct inconsistent with the claim supposedly supporting nonconsent. Any rape shield law which precludes such rebuttal proof would not pass constitutional muster.[147]

C. *Conclusion*

As this review of cases and principles of rape shield litigation has shown, it is impossible for any statute to proscribe the kinds of cases in which prior sexual conduct of the victim should be excluded and still be constitutional. There is no precedent for such a legislative determination of relevance and the absence of such a precedent is understandable since legislatures generally recognize their inability to cover all evidentiary possibilities.[148]

The difficulty with this doomed effort at total legislative proscription is more than just theoretical. Trial courts generally defer to the legislature and are more reluctant to either reinterpret legislation or find it unconstitutional than appellate courts.[149] Thus, where a statute is of the Michigan-type and the proffered evidence is not within the specific exceptions contained in the statute, lower courts are reluctant to admit the evidence. Appellate courts not quite as constrained and deferential to legislatures are more likely to find that constitutional principles require admission. The end result is reversals, which, if they are at the intermediate appellate level, may themselves be only a step along the appellate process.

The nature of the reversal now becomes important. Where a judgment of conviction is reversed because the trial court improperly excluded exculpatory evidence, the ordinary remedy is a new trial. This is not a case where the appellate ruling suggests a legal insufficiency of the charge or the evidence requiring dismissal. We are then back in a trial posture, only now a year or more after the original trial and possibly an additional year or more from the incident giving rise to the criminal prosecution in the first place.

In such a setting a prosecutor has three choices: drop the case, agree to a guilty or no contest plea to a lesser offense, or continue with a case now weaker if for no other reason than the passage of time. The first two of this trio of choices are

147. *See* State v. Williams, 16 Ohio App. 3d 484, 477 N.E.2d 221, *aff'd*, 21 Ohio St. 3d 33, 487 N.E.2d 560 (1986); State v. Gavigan, 111 Wis. 2d 150, 330 N.W.2d 571 (1983).

148. As has already been noted, exceptions to the rule prohibiting prior similar acts are permitted with the "such as" clause found in FED. R. EVID. 404(b). A similar legislative deference to the unpredictable complexities of what can materialize in the courtroom can be found in the catchall paragraph to the various hearsay rule exceptions. *See* FED. R. EVID. 803(24) and 804(b)(5), which empower the courts to admit hearsay having comparable guarantees of trustworthiness to the hearsay admitted under the designated exceptions.

149. *See, e.g.*, State v. Herndon, 145 Wis. 2d 91, 100 n.1, 426 N.W.2d 347, 350 n.1 (Ct. App. 1988).

obviously not in the victim's interest. If the last of these alternatives is followed, unless the victim is unavailable within the meaning of Rule 804(a), the victim must testify at the retrial. Even if unavailable, if the error in the first trial was the improper curtailment of the examination of the victim, then use of the transcript of the first trial simply perpetuates the error and is therefore not a viable option. It would therefore seem that the reversal would require that on retrial, if that is the option followed, the victim must testify again. It is clear therefore that none of the three options created by reversal is particularly in the interest of either the prosecution or the victim. Nevertheless, this is precisely the result we must continue to expect, perhaps with even greater frequency, as the number of cases finding rape shield laws unconstitutional increases. There must be an alternative.

IV. RECOMMENDATION

Professor Galvin, in her exhaustive and thoughtful article on rape shield laws, concludes that rape shield laws are essentially rules of relevance and there is no conflict between the victim and the defendant since the defendant has no right to the admission of irrelevant evidence.[150] Consistent with that approach, she urges that a rule of evidence parallel to Rule 404 be adopted which would provide that the sexual conduct of the victim of a rape is not admissible to support the inference that a person who has previously engaged in consensual sexual conduct is more likely for that reason to consent. This general ban on the impermissible use of prior sexual conduct evidence is then excepted with a provision that such evidence may be admitted for other purposes, and by way of illustration but not definition of such other purposes, she lists proof designed to (1) prove that another person is responsible for the physical consequences of the rape alleged, (2) prove bias on the part of the victim, (3) show a pattern of evidence ("so distinctive and so closely resembling the accused's version . . ."), (4) show reputation evidence known to the accused and offered to prove a reasonable belief in consent, (5) rebut proof produced by the prosecution regarding the victim's sexual conduct, and (6) show false allegations of sexual assault.[151] She would also add to Rule 608 of the Rules of Evidence a specific provision that evidence that the victim has engaged in consensual sexual conduct is not admissible on the credibility of the victim.[152]

Professor Galvin recognizes that rape shield laws have a "hybrid quality." She notes that "these laws are similar to the evidentiary privileges in that they seek to protect the privacy interest of nonparty witnesses. Unlike privileges, however," she concludes, "rape-shield laws are designed to further truthfinding by excluding irrelevant and prejudicial evidence."[153]

As has been seen earlier in this article, however, rules of relevance are already in place and the two impermissible common law notions that a woman who has

150. Galvin, *supra* note 17, at 902.
151. *Id.* at 903–04.
152. *Id.* at 904.
153. *Id.* at 856–57.

consented once is fair game and that promiscuity promotes dishonesty have been discredited by cases.[154] Further, an honest application of the counterweights of Rule 403 does not place the policies of a rape shield law into the balance to offset minimal probative value. If viewed strictly as a relevance issue, there is no basis to take the victim's privacy into account. Courts have certainly not regularly taken the provision in Rule 611(a) giving them the power to protect witnesses from *undue* embarrassment as a basis to protect the privacy of sexual assault victims. Even under Professor Galvin's elaborate proposal, a court would have to stretch to consider policies generally recognized to underlie shield statutes under Rule 403. The protection afforded by rules excluding irrelevant evidence is not enough; an openly recognized privilege with respect to prior sexual conduct is called for.

It has earlier been pointed out that if rape shield laws are viewed as creating a privilege, the knotty problem of waiver is easily handled.[155] In addition, the victim's standing to challenge the admissibility of evidence relating to prior sexual conduct and to appeal adverse rulings is fortified. That the privilege covers both otherwise admissible and inadmissible evidence means nothing since that is the case with other privileges as well.[156]

It should also be abundantly clear that there are extraordinarily valid social interests compelling the creation of a privilege. A victim's right to privacy with respect to the most intimate aspect of human behavior is certainly an interest warranting protection.[157] This is especially true where the right to privacy has been found to have constitutional components in both the fourth amendment[158] and more generalized constitutional protections.[159] Coupled with this individual right is the highly desirable societal interest that victims of crime shed any reluctance to report the crime to the police predicated on a fear that appearance on the witness stand will be open season on all past sexual conduct.

On the basis of these considerations, it is proposed that a privilege be enacted as follows: Evidence of prior sexual conduct by a complaining witness in a sexual assault prosecution is privileged and admissible only if the defendant's constitutional rights require its admission. The complaining witness may participate in evidentiary questions arising under this rule and may appeal an interlocutory order overruling the claim of privilege.

Notice provisions comparable to those found in Rule 412 could then be ap-

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154. *See* United States v. Kasto, 584 F.2d 268 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976); State v. Geer, 13 Wash. App. 71, 533 P.2d 389 (1975).

155. *See supra* note 63 and accompanying text.

156. For example, an attorney, in the course of speaking to a client, can learn both otherwise admissible and inadmissible facts. The privilege applies to both. The same concept would apply to communications between spouses, privileged under the laws of most states. *See, e.g.*, N.Y. CIV. PRAC. L. & R. § 4502 (McKinney 1963).

157. The two policy considerations, individual privacy and a limited trial inquiry to encourage reporting, are different. Theoretically, a sexual act committed in public could hardly be claimed to be private in nature. Nevertheless, reporting sex crimes would be furthered by a rule prohibiting inquiry into such public behavior at a subsequent trial. Therefore, even in such a case, the privilege would still apply although its basis would obviously not be the private nature of the particular act.

158. *See* Katz v. United States, 389 U.S. 347 (1967).

159. Griswold v. Connecticut, 381 U.S. 479 (1965).

pended to the rule requiring a pretrial *in camera* hearing of any litigant intending to offer evidence of prior sexual conduct.[160]

So stated, the privilege would be comparable to the shield privilege journalists enjoy in most states.[161] Its qualified nature is no different than Rule 412 as presently worded. It does not appear that the qualified nature of the federal rule has served as a major impediment to the reporting of sexual assaults.[162] Furthermore, defining a right or privilege in terms of constitutional considerations is not a novel concept. In addition to such an underpinning to Rule 412, the prosecution's right to appeal in a federal criminal case is defined in terms of the defendant's right to avoid double jeopardy.[163] Indeed, the federal interlocutory appellate rights of the prosecution, bounded as they are by the defendant's double jeopardy rights, serve as something of a statutory model for a privilege also bounded by a defendant's constitutional rights.

While it is tempting to place into the privilege a legislative exception for prior sexual conduct with the defendant, there does not appear to be any need to do so. Just as a rape shield law which enumerates instances where evidence of prior sexual conduct is admissible undertakes the impossible job of stating that in all others it is not, a law which provides for automatic use of evidence overlooks that there may be instances where such evidence ought not be admitted.[164] A note to the recommended statute indicating the presumptive admissibility of such evidence might be in order.

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160. The notice provisions in the federal rape shield statute are as follows:

(c)(1) If the person accused of committing an offense under Chapter 109A of title 18, United States Code [rape or assault with intent to commit rape] intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

FED. R. EVID. 412(c). This should be changed so that the procedural mechanism is triggered if either the prosecution or the defendant intends to offer evidence of prior sexual conduct.

161. *See, e.g.*, ILL. ANN. STAT. ch. 110, ¶ 8-901-909 (Smith-Hurd 1984 & Supp. 1988); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (Supp. 1989).

162. *See supra* note 74.

163. 18 U.S.C. § 3731 (1989).

164. The fortuity in a "stranger" rape case where the issue is one of identity, that the victim and defendant had, on some prior occasion, had consensual sexual relations, should not serve to warrant the admission of that prior sexual conduct. Unlikely as such a scenario is, a review of the cases reveals that stranger things happen.

V. Conclusion

As this examination of rape shield law has shown, well-intentioned efforts by legislatures to define the instances where evidence of prior sexual conduct is admissible have, in a too-large number of cases, served to prolong litigation, a delay in no one's interest other than the person charged with sexual assault. While the strong aversion to the holdings of the older cases readily explains the desire to frame rape shield legislation in terms of relevance, such a definition of the evidentiary concept involved is both redundant of existing rules of evidence and too cramped in procedural consequences to accomplish the underlying objective of a rape shield law. Rather, a broadly stated privilege accomplishes the same objectives, avoids some of the problems inevitable under most statutes in use at present, and creates options which solidify the right of victims of sexual assaults. The continued viability of *Davis v. Alaska* and *Chambers v. Mississippi* insures that the defendant's rights are not overlooked.

The process of balancing is a delicate one. Over a decade of statutory drafting and redrafting interspersed with case law has given us the reason to fine-tune that balance. It is hoped that this Article contributes to that process.